

Eminent Domain Task Force Meeting
October 13, 2005
State Capitol – Hearing Room 7

The Eminent Domain Task Force meeting was called to order at 10:12 am by Chairman Terry Jarrett. Task Force members present were: Terry Jarrett, Leslie Holloway, Howard Wright, Lewis Mills, Chris Goodson, Gerald Carmody, Senator Chuck Gross, Representative Steve Hobbs and Spencer Thomson.

Chairman Jarrett welcomed members and visitors to the meeting. Minutes of the September 29, 2005 meeting were reviewed. Motion made by Chris Goodson, seconded by Gerald Carmody to approve. Minutes of the September 29th meeting were approved and will be posted on the internet site.

Announcements:

1. The preliminary report was submitted to the Governor on September 30 and a copy is posted on the web site.
2. The transcripts of the public testimony meeting are now available on the website. Thanks to the Senate staff for transcribing the tapes.

Panel presentations:

Jim Lowry, Representative of Investor Owned Utilities and partner at Smith Lewis LLP Law Firm in Columbia.

Mr. Lowry has practiced law and dealt with eminent domain issues since 1992. He has represented utilities, Ameren UE and land owners.

Mr. Lowry stated that he believed the task force has a desire to look more broadly at how processes regarding eminent domain can be improved in Missouri. One of the things important to look at is the key distinctions between what is a public utility and utilities that exercise eminent domain. It has been said that Missouri has one of the worst records of eminent domain misuse. These statements were made by the Institute for Justice and the Castle Coalition. There is a distinction between what utilities do and what private developers do with regard to eminent domain issues. Public utilities such as Ameren UE are in a sense privately owned companies with respect that their shares are traded publicly but their properties are defined as public use. Utilities such as this only use eminent domain to improve or maintain infrastructure and to meet the needs of safe and adequate service.

Any process that has been around as long as eminent domain stands to use some improvements without impairing the ability to construct. High points would be:

- . Land owner notification and education
- . Clear understanding of property owners rights, what the law is, how the process works
- . Good faith offers
- . Mediation – as long as it is cost effective and timely

- . Century farms
- . Commissioner qualifications and instructions
- . Alternative routes

Pat Baumhouer testified on behalf of the Rural Electric Cooperatives of Missouri. Rural Electric Cooperatives serve Missouri, Oklahoma and Iowa. Missouri Electric Cooperatives have invested almost \$5 billion in infrastructure.

Rural Electric Cooperative is part of a three tier system. The top tier (distribution cooperatives) of this three tiered system is made up of 51 local distribution cooperatives that provide electric service directly to consumer-members, including businesses, farms and households. The second level of the system is the six regional cooperatives known as G&T's that transmit power from AEI to the 51 local distribution cooperatives. In 1961 the six G&T's joined to form Associated Electric Cooperative Inc. (AEI), the system's third tier to take care of generation, power procurement and high-voltage transmission. Rural electric cooperatives are unique among electric utilities. Cooperatives are not-for-profit businesses, established by local residents to provide at-cost electric service and governed by a board of directors elected from the membership. In a cooperative the members are the owners. As the US economy becomes more energy intensive, utilities must constantly plan for new resources to keep up with rising electricity demand. According to the US Dept of Energy, Americans will consume nearly 50 percent more electricity by 2025. Energy sales to AEI's member systems are projected to grow 2.8 percent per year through 2014. That amounts to a total increase of 28 percent. It is estimated that a new plant will have to be built about every 6 years.

In terms of acquiring the land needed for infrastructure, electric cooperatives have by statute the authority to use eminent domain. Distribution cooperatives have never exercised eminent domain. Members agree as part of the membership to grant whatever easements are necessary to provide distribution services to other members. Cooperatives have never paid for those easements. G&T level uses eminent domain and have always paid fair market value or greater for the properties they have acquired. History is that 90% of the easements acquired are voluntary with only 10% of the easements requiring condemnation. AEI is proposing to build a coal-based power plant to meet the growing electric demand among its members near Norborne and in this endeavor have tried to work with the people whose land is being affected and not have to resort to the use of eminent domain. The system in place works well; however, we have heard complaints but have worked to resolve these issues. On average, producing electricity from coal costs less than half the cost of producing electricity from other traditional fuels. New plant about 660 megawatts.

Leslie Holloway remark – We have three land owners here today to discuss issues and would like for you to stay and listen to them.

Q: Is it correct that you said that you build new power plants every 6 years?

A: Planning takes place when the load continues to grow at the current rate and if this occurs, yes, it is estimated that a new plant would have to be built every 6 years. If load changes (reduced) then alternatives could be considered. Analysis of resource plan is completed on a yearly basis.

Q: Studies have shown that Missouri is exporting surplus power and that an estimated 2% lower energy growth rate is projected. Are growth projections declining?

A: We study these rates constantly and figures go up and down all the time. Right now we see a 4% growth but it could trend down to 3%. Every two years we study the issue from the ground up to make plans for coming years. Peak last summer was 3,999 megawatts. We have more than the amount of electricity we need because we should have sufficient capacity to cover the loss of our largest unit due to mechanical breakdowns. Largest unit is 630 megawatts so we must have extra supply available in case this unit fails for any reason. Extra capacity is sold to other electric utilities with some capacity going out of state. In Missouri all of the electric providers work together and we haven't had to duplicate lines or power sources. We also have shared planning. Missouri electric providers have kept rates lower than in other states by working together.

Leslie Holloway: Industry has changed so much in recent years and the trend is to sell capacity with much of the capacity going out of state.

Response: The plan of the Associated Electric Cooperative is not to plan or build extra plants to sell specifically out of state. If there is extra power, we sell to others to offset some of the costs. AECI has never built a plant or a transmission line with the thought that our members don't need the electricity but we can sell it to someone else and make a buck on it. Transmission systems are now being used to shift low cost power from one part of the country to another. Private utilities are now required to participate in a regional transmission of organizations. Ameren's plans are to build plants to serve their own customers, but reserve energy can be sold to other areas and have obligation to be a member of MISO which deals with energy and capacity on a federal level. Ameren UE must have capacity reserve margins of 17%. Energy and environmental policy prohibit putting transmission lines and power plants where the supply is needed, such as in cities, and instead put these in rural areas and then get the supply to where it is needed.

Q: Why haven't you sold more energy?

A: Both gentlemen indicated they sell all they can, but don't speculate to build to sell to outside markets. They build only for use for the members.

Question: How many jobs do you create? (Directed to AECI)

A: At the Norborne site approx 137 jobs. Overall employment is thousands of jobs, but do not know exact amount.

Q: In last few years has the use of eminent domain increased or stayed the same?

A: Transmission is decreasing. Haven't built a new coal plant since the 1980's so therefore there has not been an increase.

Q: Do you select location of new plants versus where the loads are?

A: G&T's, etc. all planned as whole (as single system). Many variables to consider; transmission costs, fuel, etc.

Q: Load growth (customer numbers or pure growth)?

A: There are more people and people are using more power.

Q: What is your customer profile?

A: Primarily residential use.

Comment - Steve Hobbs: Example of the Carrollton meeting explained to group. There has been overlapping of meetings which has led to mistrust of land owners. Procedural issues exist. Notification is an issue that needs to be discussed within the task force. Right of way issues are another item of concern. Absentee landowners are first to be contacted. How the process works ... after absentee land is bought, you go to the first landowner for the takings and visit with that person and if a deal can be struck, go to the next one. But if the second landowner will not sell, the utility (etc) immediately goes to the next landowner and tries to get the second owner landlocked in. In many cases the first notification of the project was when a person knocks on their door and offers a sum to purchase their land and, oh by the way, if you don't sell we are going to condemn it. Task force needs to work through the procedural process and hopefully you will work with us to address the problems. Cooperation on all levels is needed.

Discussion by Spencer Thomson as to the definition of public use. Used example of Sam's Club. Missouri Electric Cooperatives members must pay a fee to belong and therefore is not open to "the public". Most of the cooperatives have now done away with the membership fee and therefore makes it more open to the public, although membership must be approved by the Board of Directors.

Leslie Holloway gave comments from Rob Korff, President of the Carrollton Farm Bureau. He writes: *I have been thinking about what I wanted to convey to the task force and I think there needs to be some clear differences put into place for different cases. Such as MoDOT taking land for a road or bridge should be in a different category than a utility, railroad, or any government body taking land for economic development. Roads and bridges are needed and anyone that travels in the area can benefit from them. This is a different issue than companies that are using the condemned land to make money! Any land needed should be held to the bare minimum and I think for roads and bridges, appraised market value plus 10% extra for the hassle. But if a company is going to make money off of the process, well that is just plain WRONG, but they should have to pay 4-5 times the present value plus the 10% hassle fee. And anyone that is forced to sell should be exempt from any and all taxes on those monies paid for that land. Also there should be legislation that requires the public to be informed by paper and radio and/or put to a vote when any company or government body is planning on using condemnation procedures to develop an area for anything. The behind the door, under the table, keeping everything a secret from the people should be STOPPED and not be allowed to happen again. It is wrong when hard working, honest, tax paying citizens of a great and free country can be forced out of their homes and off of their farms and ranches just because a company or government body wants to do something else with the land and make money because of it. It is a terrible injustice and quick and decisive action is needed.*

The next panel to address the task force was landowners/farmers. The group consisted of Byron Baker, a century farm landowner from Linn, Missouri; Bill McClaren, farm landowner from Pacific, Missouri and Loren Jensen, farm landowner from Macon, Missouri.

Mr. Baker owns a century farm which has been in the family since 1856. Mr. Baker and his brother run the farm and have a cow/calf operation. He is a graduate of the University of Missouri and has an Ag Degree. He works at Linn State Bank. His father worked for Missouri State Highway Department for 29 years. His job duties included negotiating access to farmers' property and taking soil samples for future roadway acquisition. In 1987 his father retired to farm full time. He explained their ordeal with Central Electric Coop. In 1998 they found out Central wanted the property. At that time they had no intention of selling the property and even today have no intention of selling. Negotiations are difficult with someone who holds the trump card. The eminent domain trump card. It is said that electric utility companies negotiate in good faith with land owners before they take the step of eminent domain. How can someone negotiate in good faith when they know they can always take the land through condemnation? They cannot negotiate in good faith by virtue of knowing they have condemnation power. Most people cannot stand the stress of having to go to court to fight for their rights. His father would have negotiated with Central if they would have been forthright and honest with him and acted in good faith. He had worked in related field for 30 years and knew the Central people were not on the level with him. It was their way or no way. Meetings were held and discussions held but it was always on Central Electric Coops terms. Central Electric told his parents to get an appraisal on the property which they did. They hired Jack Blaylock, professional appraiser from Columbia who had also done work for Central Electric Coop. Central did not acknowledge the appraisal. Condemnation process – the local judge appointed three people from the county. The three people did not have any training or experience in appraisals. In this case there were two farmers and a banker. All three were members of Three River Electric Cooperative and as such were owners of Central Electric. The process was not about value, but about the commissioners trying to please both sides. They determined the value by taking Central's offer and the appraisal amount and essentially splitting the difference down the middle. This is not fair market value. As far as condemnation, utility companies have been able to get favorable case rulings. You cannot introduce what a utility is paying or has paid to make a case. Appraisers use three determinations to reach value. First is the cost approach, the second is the income, and the third is market approach. They have in fact eliminated the market approach for utility takings. The courts will let you use what farmers have sold to other farmers but not what farmers have sold to other telephone companies, etc. The income approach has been eliminated. Free enterprise above the ground but not on the ground with respect the land taking. They paid for a 100 foot strip, but you can see it from any point on their property and it overshadows the beauty of the land. Ruts are so bad and when Central was confronted about the ruts, he was told that they would have fixed the ruts if they hadn't been made to go through the condemnation process. Attorney should have specifically sought money for those damages when the papers were filed. Arrogance must be stopped. (Provided photos of the ruts on the property.) His father asked if he could have the wood to burn that Central had cut to making way for the utility lines and was told the judge wouldn't let him have the wood. They confirmed that the judge said no such thing. Instead of letting his father have it, Central contractors put all the wood in a big pile and burned it. Condemnation notice is the first real piece of information received indicating that the process has been filed in the court.

Bill McClaren testified next. His issue is with the Missouri Dept of Transportation. Highway O was relocated through his property. A five-mile stretch was relocated and four of the five miles were owned by eight property owners. Of those eight property owners, five were century farms. They don't understand the importance of century farms. All eight property owners were condemned. Condemnation is necessary but changes need to be made. Typical property owners do not have lawyers, etc. – tables are weighted in the condemning authorities' direction. They understand and know the law better than anyone else. Average citizens do not know the law and have to educate themselves on it. Consequently, average citizens have to rely on the legislature to help protect their rights and enforce their rights. There needs to be changes made to the condemnation procedure – fair and sincere negotiation, look at highest and best value, and just compensation for what is taken. In 1991 he was notified by mail that they were going to do highway, then in 1999 MoDOT came with appraisers and asked to see property, and in October 1999 a MoDOT representative made them an offer. They countered the offer and never heard from MoDOT again February 2001 when MoDOT called on a Saturday and said that they were going to condemn and that the papers would arrive that next week. They went through the commissioners' process. The commissioners' award was about \$17,000 per acre for his property, which was considerably more than their offer and more than what was countered. He asked why MoDOT had not taken the time to sit down and discuss offers and the answer was "we are too busy working on Hwy 141 and will just go ahead and condemn." Fair negotiation will help both sides. All eight land owners were not unreasonable people. All of the land owners knew the highway needed to be there. His neighbor got \$11,050 per acre from MoDOT. Value needs to be made with comparison to farms in the area, not farms 20 miles away. His neighbor recently sold four acres for \$15,000 per acre. He feels that if MoDOT wanted four acres of his property why shouldn't they have to pay what his neighbor got for his four acres? Fair compensation for fair taking. After depositions and commissioners' award has been given and the road is built, you still don't have any money. The money is in the circuit court. If you take it and lose the condemnation case, you pay 6% of what you were given. He is currently paying 2 ½ percent on money deposited. He received a 1099 on December 28th to take taxes on the money which he didn't have yet. Bill stated, "The final thing and the most important thing is that I am the one that lost part of my grandfather's farm. They have their highway built and I am the one that has to prove that I deserve the commissioner's award. It is not MoDOT's responsibility to disprove that, it is my responsibility to prove it. It needs to be the condemning authorities who disprove the commissioners' award. Otherwise, the land owner should get the commissioners' award. If condemning authority takes the whole property that's pretty simple, but the way the law is currently written, if the value of the difference before the event took place is what your property is worth versus what your property is worth the day after the event. Just compensation for what is taken."

Loren Jensen, farmer from Macon was the last to testify. He feels that the inconsistencies of settlements with property owners is absolutely absurd. He got a letter from Northeast Missouri Electric Power at the end of March informing him that they were going to build a 161,000 volt transmission line and intended to cross his entire farm. After negotiation about an alternate location, only ½ mile of his property was going to be affected. The pricing system is difficult. In his area they have different markets to contend with – deer hunter market who will give \$2000 per acre and retiree market giving as much or more than deer hunter market. He has worked on

his property for 17 years getting it ready to sell off acres for subdivision tracks for retirement income and has spent over \$30,000 to get it ready. The sale of these tracks at approximately \$3000 per acre is the bottom range. Now people won't want to build a home under a 161,000 watt transmission line. The electric company wanted Mr. Jensen to sign a 100 foot easement for the rest of his life, his children's lives and his grandchildren's lives for a one time payment of \$200 per pole. They will set approximately four or five sets of poles which equates to about \$200 per acre. How do you define just compensation? It is probably a different definition with each committee member. Here lies the problem. Farmers have been labeled as price takers. Through the task force activity and that of the Governor, hopefully something can get done to resolve the issues. Farmers in number are small, so the people that have been injured are small. Now is the time to overhaul and rebuild the system.

Q: What is your definition of just compensation?

A: Certified appraisers, lease of easements with inflation index. Need to clear up inconsistencies with how value of land is determined. Make condemnation procedure harder in the court system. Need to do a better job of negotiation and understanding of the situation. Utility companies, etc. know the property of the land because in many instances they have already paid a neighbor for his property and know the value. Why can't they negotiate in good faith? Right of way costs should be the same market value as a piece of property within two miles that sold. The easement may be only for 100 feet, however, they don't want anything around wire for safety reasons and therefore the land owner has to stay back at least another 50 feet on each side of the wire.

Q: What are your feelings on mandatory mediation process before condemnation?

A: Need appraisals done before mandatory mediation.

Spencer Thomson – proposal that three appraisals be one – one paid for by the company, one by the land owner, and one with the cost split to determine fair market value. Finding qualified appraisers may be an issue, just as it is with finding qualified commissioners. These are challenges that exist.

Response: Need something that will put the playing field on a more level basis. Gave example of appraising a piece of lake property, one that is on the lake or another that is three miles away, big difference. Mr. McClaren again stated that a 20 mile distance from the property being compared is too far away. Need to negotiate harder and longer before going to mediation. Mr. McClaren's neighbor is still in court and cannot enter into evidence the amount that MoDOT paid Mr. McClaren. Procedural rule in court prevents this information from being entered. Mr. Jensen stated that he knows the utility company was paying the same amount of \$200 per pole 20 years ago and are still trying to pay the same amount today. Land values 20 years ago were a lot less than they are today. Need to give more consideration to change.

Q: There are concerns about when you have a deal that utility companies have the right to use easements for other purposes. If contract says the easement can be used for other purposes, then that is the basis of the contract. Maybe language isn't clear enough? How can you determine the value today on what the future use will be? Perpetual easement. Re-evaluation every few years. Could become very problematic. Suggestions on how to make practical?

A: If you have an easement of 100 feet, land owner needs to be compensated for loss of 100 feet and also the impact it has on the remaining value of the property.

Q: Following up on the value statement, are there low ball offers? There was a low ball offer clearly in Mr. Jensen's case. He was offered \$200 per pole and within a mile's distance of from his property, property sold for \$2000+ per acre.

A: Some land prices are going for over \$3000 per acre.

Q: Has the assessed value of your land gone up in recent years?

A: Need to be very careful when talking about assessed value. It is a terrible burden to use assessed value.

Q: The beginning offer needs to start at a percentage of the assessed value.

A: There were four major farm areas associated with Highway 0. One farm, owned by a 92 year old gentlemen was offered \$6000 per acre. The land next to his one negotiated a price of \$12,000 per acre. Another received \$15,000 per acre and Mr. McClaren received \$17,000 per acre. The \$6000 per acre was a low ball offer. People with eminent domain power don't have to negotiate.

Q: What has been your involvement with municipality in these situations?

A: In nonincorporated Franklin County in the area where growth is going to happen, the only involvement with the county was to select three commissioners after they filed a petition to condemn. Interface was limited. Back to low balling, many times companies are able to low ball because the landowners are scared of them. Some are widows, or old people and they don't know what to do. Intimidation factor is what is used. Much of the property (farms) is owned by older citizens. Many are in their 60's-70's and older. Many of these people never thought they would live long enough to be condemned. They are playing on the fear of the elderly people. If I want to buy your house I can come to you and make an offer and you can reject it or take it and that is the way it should be, but in a case with the power of condemnation, the condemner should have to have an outside independent appraisal if the seller said he wants it done. That would help eliminate the low ball offer. The appraisal has to be for "like" property and consideration should be made as to damages.

Q: Panel has said they want to get fair market value for the land based on market value because of market development and so forth, but yet the property is not assessed at the higher rates. This is like having your cake and eating it too.

A: The land is also not for sale. That's the difference. Condemnation is a sale I did not choose. If I wanted to sell, I wouldn't sell it as agricultural land, I would sell it as residential or commercial. This is a different debate completely. Example – death tax, if my great grandfather's land has never changed hands, why am I paying a huge death tax on it? I don't choose to sell it but if I do sell it, I should get the highest value I can get for it. Mr. Jensen was in the process of having land reclassified and he knew the taxes would go up, but they would not consider this because the reclassification had not become legal. He should be paid for highest and best use of land.

Representative Hobbs: Talking about assessment, the assessors in my area are very diligent in Audrain County. In Mr. Jensen's case the easement is affecting his ability to use land for the intended purposes that he had in mind. They are only paying \$200 because they think they are only harming the land where that pole sits. Land had already been broken up into tracks and in the process of having it rezoned.

Response: Mr. Jensen had already spent approx \$30,000 of his own money getting the land ready to rezone.

Representative Hobbs: Talking about partial taking – fact, 100 acre track brings less per acre than a five acre track. Is that correct? Yes. That is true in almost every area of the state. Smaller tracks bring more. Unfortunately, MoDOT especially, can use the factor that we are taking four acres from person A and four acres from person B. Person A only owns six acres, so they are taking four of the six – estimate \$10,000 per acre. Person B has 320 acres and they are saying that that land is only worth \$1000 per acre because it is agricultural land and are therefore only going to give Person B \$4000 for their land. Trying to get addressed is that four acres is four acres. It shouldn't be worth less because it is four acres in the country instead of four acres in the city. Panels' land was valued less because they owned more land.

Response: Asked MoDOT about that exact thing and their response was that you have lots of land, and you're not going to miss four acres. That was their reply.

Representative Hobbs: Re rut issues. This does cause serious problems with farm equipment and breaks up the land. It is wrong that when we look at condemnation, now the procedure is if you don't go ahead and negotiate with us up front, and take what we offer you, we will condemn and from that day forward you are not entitled to damages on your property. No one can know what damages will occur in the future on that property. This is something else that needs to be addressed.

Leslie Holloway thanked the panel members for coming in. She could have asked many more people to come in and testify, but issues were addressed well by having these three gentlemen appear before the panel.

Task Force reconvened after short break.

Terry Jarrett stated that at the next meeting the task force will break into working groups to form action items and be ready to propose and/or debate the issues. The task force will reconvene as a whole in the afternoon.

The next two meetings will be held on November 3rd and November 10th.

It was asked that specific recommendations which were promised from other panels be obtained and be available at the next meeting. Chairman Jarrett will contact the other panel members and ask for their recommendations.

Meeting adjourned at 2:00 pm.